**CRIMINAL APPEAL No.59 OF 1988**

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**Against the Judgment and order dated 27.1.1988,**
**Passed by 3rd Addl. Sessions Judge,East Champaran**
**At Motihari in Sessions Triual No.134/1985 221 of 1988.**

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1. **Bikrama Tiwary**
2. **Suresh Tiwari**
3. **Subhash Tiwari**
4. **Uday Tiwari----------(Appellants)**

**Versus**

**The State of Bihar----------(Respondents)**

P R E S E N T

**THE HON'BLE JUSTICE SMT. MRIDULA MISHRA**
**THE HON'BLE MR. JUSTICE SHALESH KUMAR SINHA**

Mridula Mishra &
Shailesh Kumar Sinha,JJ All four appellants have been convicted under Section 302/34 of the Indian Penal Code by judgment and order passed by Sri Shashi Kumar Chaudhary,3rd Additional Sessions Judge, East Champaran at Motihari in Session Trial No.134 of 1985/ 221 of 1988 and sentenced to under go rigorous imprisonment for life. Appellant nos.1,2 and 3 are sons of appellant no.4 Uday Tiwari.

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2. Prosecution case as disclosed in the fard beyan dated 28.2.1983 of Meghu Sahani (P.W.4) the informant of the case is that on that very date he along with his brothers Dahari Sahani (deceased) and Chhathu Sahani (P.W.6) had gone to Ekdarwa Kanta for getting Chalan for sugar cane. They had gone to Ekdarwa at 5 P.M. in the evening and waited for chalan till 10 'O Clock in the night but did not get the chalan. They were returning to their home and on way when they reached adjacent to the house of Rajdeo Choubey suddenly from the house of Rajdeo Choubey accused Bikrama Tiwari, Suresh Tiwari, Subhash Tiwary and Uday Tiwary along with female members of Rajdeo Choubey came out and caught

hold of Dahari Sahani. They dragged Dahari Sahani towards courtyard in the house of Rajdeo Choubey and started assaulting him. Bikrama Tiwari was armed with Dabia, Udai Tiwari was armed with Khurpi. They assaulted Dahari Shani with the weapons in their hands. Dahari Sahani due to assault became unconscious. The informant and his brother Chhatu Sahani tried to rescue Dahari Sahani but they were chased to assault as such they ran away towards their house. Dahari Sahani died because of the injury received on account of assault. The informant thereafter directly went to the Bharwaliya out post and informed the police force and then with the Chaukidar went to the police station and got recorded his statement.

3. A police case vide Paharpur P.S.Case no.18 of 1983 was registered against the appellants under Sections 147,148,149 and 302 of the Indian Penal Code. The Investigating Officer (P.W.10) on completion of investigation submitted chargesheet. The case was committed to the court of Sessions for trial. Charge was framed against the accused persons under Section 302/34 of the Indian Penal Code.

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4. The prosecution in order to prove its case examined all together ten witnesses. P.W.1 is Janak Sahani. In the F.I.R. Janak Sahni's presence has not been mentioned by the informant. It has not been stated that P.W.1 was also accompanying the informant while he was going to his home at 11 P.M. in the night or he came at the place of occurrence immediately after the occurrence.. However P.W.1 has said that he was in the company of Meghu Sahani (P.W.4) and Chhathu Sahani (P.W.6) and has witnessed the occurrence. P.W.2 is Bachchan Mishra. This witness has stated that he was sleeping at his house and woke up on hearing hulla. P.W.1 and P.W.4 came at his house and informed that Dahari Sahani is being assaulted. This witness has admitted that there is enmity in

between Rajdeo Choubey and Udai Tiwari . P.W.2 has also stated that on the next day he heard rumor in the village that Dahari Sahani had entered into the house of Rajdeo Choubey for committing rape. P.W.3 is a formal witness. He has proved the enquest report. This witness has disclosed in his evidence that P.W.1 is own brother of Ratan Singh (P.W.9) who was a Dafadar posted at Bharwaliya out post. P.W.4 is the informant as well as own brother of the deceased Dahari Sahni. P.W.4 Meghu Sahani deceased Dahari Sahni and P.W.6 Chathu Sahani P.W.4. are brothers P.W.4 has stated that when he reached near the house of Rajdeo Choubey, Bikrama Tiwary, Udai Tiwary, Subhash Tiwary and Suresh Tiwary as well as the female members of Rajdeo Choubey's family came out. They all caught hold of Dahari Sahani and dragged him towards the courtyard of Rajdeo Choubey's house. Bikrama Tiwari assaulted with Dabia in the abdomen of Dahari Sahani and Udai Tiwari assaulted with Khurpi. Other accused also assaulted with lathi. He has also stated that Dahari Sahani started bleeding and was in the pool of blood. At the place of occurrence Chokat Mahara (not examined) Baidyanath Raut (not examined) and Janak Singh(P.W.1) came and saw the occurrence. These persons also tried to restrain the accused persons but they were adamant to assault the deceased. Informant has also stated that from the place of occurrence he went to his house and thereafter in the company of P.W.1 Janak Singh he went to the out post at school where the constable took his L.T.I. There he narrated the incident and thumb impression was also taken by the constable. Again he came to the place of occurrence which is the house or Rajdeo Choubey with the constable and chowkidar and from their he went to police station. At the police station the Officer-in-charge recorded his fard beyan and he put his thumb impression. The motive for the occurrence as disclosed by P.W.4 is that earlier Dahari Sahani had been instrumental in getting arrested Bikrama

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Tiwari which has been avenged. P.W.5 Sheo Shankar Raut has stated that in the night of the occurrence he was on duty at Bharwaliya police out post. Dafadar Ratan Singh (P.W.9) as well as police force was also there. At that time the informant Meghu Sahani (P.W.4) and Janak Singh (P.W.1) came and stated that they had gone to Ekdarwa Sugar Mill and while coming from there they reached near the house of Rajdeo Choubey and saw that the accused Bikrama Twiari, Subhash Tiwari, Suresh Tiwari were dragging Dahari Sahani towards the house of Rajdeo Choubey. These people killed Dahari Sahani and dead body of Dahari Sahani is lying in the house of Rajdeo Choubey. On this information P.W.5 along with P.W.9 and police force went to the house of Rajdeo Choubey and saw the dead body of Dahari Sahani. On the direction of P.W.9 he (P.W.5) along with P.W.4 came at Paharpur police station. He has further stated that Paharpur police station is at a distance of four mile from Bharwaliya out post. Dafadar had recorded the statement of Meghu Sahani at out post and thereafter they went to village Khairwa at the residence of Rajdeo Choubey. No other person was there near the dead body of Dahari Sahani. He came to know about the incident when P.W.4 had narrated the incident before P.W.9. P.W.5 has also deposed about the normal and easiest route from Ekdarwa to village Dudhalia i.e. the village of informant. Village Khairwa i.e. P.O. village is not the normal route.

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5. P.W.6 Chathu Sahani is own brother of P.W.4 and the deceased. P.W.6 has admitted relationship of P.W.1 Janak Singh and P.W.9 Ratan Singh. P.W.6 has also admitted that one case relating to same occurrence has been instituted against Janak Singh P.W.1 and Dahari Sahani (deceased) for committing rape on the female members of Rajdeo Chaubey. P.W.6 has admitted that when he was coming to his house from the place of occurrence on way he met P.W.2 Bachchan Mishra, though this has been completely denied in the evidence of

P.W.2 as he has stated that in the night he did not go to the place of occurrence. P.W.2 has stated that he came to know about the occurrence from P.W.1 an d P.W.4 at his residence who came to inform him. P.W.6 is own brother of the deceased and P.W.4. Being a brother he did not accompany P.W.4 the informant while going to police station. P.W.8 Rudra Narayan Rao is seizure list witness. In his presence blood stained Dabia and Khurpi was also seized from the house of Rajdeo Chaubey. This witness has stated that at the time of seizure, female members of Rajdeo Chaubey's family were present but the Investigating Officer did not record their statement. This witness has also stated that he had come to know that Janak Singh had entered into the house of Rajdeo Chaubey. P.W.9 Ratan Singh is brother of P.W.1 Janak Singh. On the date of occurrence he was posted as Dafadar at the police out post. He has stated that on the date of occurrence he was on duty at police out post along with Shankar Chaubey and police force. At about 1 P.M. in the night Meghu Sahani along with Janak Singh came at the police out post. Meghu Sahni P.W.4 stated that he was coming from Ekdarwa centre and when reached near the house of Rajdeo Chaubey Dahari Sahni was caught by Udai Tiwary, Suresh Tiwari, Subash Tiwari and Bikrama Tiwary and two daughters of Rajdey Choubey. Rajdeo Chaubey's wife and two daughters dragged Dahari Sahani insite their house and started assaulting him. The dead body of Dahari Sahni was lying in the courtyard of Rajdeo Chaubey. P.W.9 Ratan Singh alongwith police force went to the house of Rajdeo Chaubey where dead body of Dahari was lying. Blood stained Dabia and Khurpi was also there. He also saw the blood mark in the courtyard. P.W.9 also saw injury on the person of the deceased. Meghu Sahni P.W.4 and Shiv Shanker Raut were sent by him to the police station and he himself remained at the place of occurrence. He has earlier arrested Bikrama Tiwary under Arms Act case and sent him to jail.

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This witness has admitted his relationship with P.W.1 Janak Singh. P.W.9 has stated that when Meghu Sahni P.W.4 came at police out post Jamadar Saheb has recorded complaint and taken thumb impression but he does not know the contents. When he came at the place of occurrence i.e. house of Rajdeo Chaubey the daughters and wife of Rajdeo Chaubey were present. The dead body was lying on mat. Two daughters of Rajdeo Chaubey had not stated before him in his presence that Dahari Sahani had came there to outrage their modesty. When P.W.9 reached near the place of occurrence in the morning the Officer-in-charge of police station came and got recorded the statement of Meghu Sahni. The dead body chalan was prepared. Three female members of Rajdey Chaubey were arrested. He did not find blood mark on the clothes of any female members. This witness has admitted that Udai Tiwary is on inimical terms with Shankar Tiwary. He has denied that in the night of occurrence he had any talk with his brother P.W.1. However this witness has admitted that the daughters of Rajdeo Chaubey and Ram Dulari Devi had instituted a case against his brother for committing rape and they have stated that on the same night his brother had entered into their house for committing rape. The case was instituted after four days of the occurrence.

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6. P.W.10 is the Investigating Officer. His evidence is that on 28.3.1983 he was posted as Officer-in-charge. In the morning of 28.2.1983 fard beyan of Meghu Sahni was recorded. He started investigation and recorded re-statement of informant. Thereafter he went to the place of occurrence which is situated in village Khairwa. At the place of occurrence he found the dead body of Dahari Sahni. He prepared inquest report. Seized blood stained soil and other articles and prepared seizure list. He found blood marks in the courtyard of Rajdeo Chaubey and also on the straw inside the room. He also found blood stained

Dabia and Khurpi and prepared seizure list. The dead body was sent for post-mortem. Female members of Rajdeo Chaubey's family were arrested. The arrested female members made their statement before him that they have killed Dahari Sahni as such no case was instituted on their statement. They were not sent for their medical examination. P.W.10 has also stated that he has not mentioned about the distance of Bharwalia from the place of occurrence and the police station. He also denied that he had received any information or document from Bhairwalia out post during investigation.Chaukidar as well as the informant did not state before him regarding any statement recorded at Bharwalia out post. Investigating Officer has stated that on the statement of the female accused he did not institute any case regarding rape because during investigation they admitted their guilt. Those females were not sent for recording their statement under Section 164 Cr.P.C. P.W.10 has also said that P.W.4 the informant was sent to police station along with Chaukidar. The Investigating Officer has also admitted that he did not find either foot steps or sign of dragging from door to courtyard of Rajdeo Choubey. P.W.10 though admitted that he did not register an F.I.R. on the basis of statement of female members but has denied that it was deliberate. His statement is that since the female members admitted their guilt that they have killed Dahari, no case was instituted on their statement. P.W.10 has admitted that he found blood at several places in the house of Rajdeo Chaubey. The defence gave a suggestion to this witness that the deceased had entered into the house of Rajdeo Chaubey for committing rape along with P.W.1 Janak Singh and thus he was killed in the house of Rajdey Chaubey.

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7. P.W.7.Birendra Kumar Agrawal is doctor who conducted post-mortem on the dead body of deceased Dahari Sahni on 1.3.1983. He found one incised wound on right front of tempral region of scalp. He also found several bruises and one

abrasion on the person of deceased. Injury no.1 according to P.W.7 have been caused by sharp pointed weapon such as Dabia, Hasua, or Fasuli and injury no.2 found on the right front temporal region of scalp might have been caused by sharp cutting weapon such as Khurpi. The cause of death as per the opinion of the doctor was due to injury no.1. This witness has also stated in his cross examination that the sharp edge weapon may also include Bhala.

8. The defence version is of complete denial. Defence case is that deceased Dahari Sahni and Janak Singh had entered into the house of Rajdeo Chaubey for committing rape. Thereafter alarm was raised and Dahari Sahni was caught inside the house. Jarnak Singh managed to escape but Dahari Sahni was done to death by mob.

9. Counsel for the appellant has submitted that the court below while appreciating the evidence of the witness has totally over looked this aspect that the prosecution has concealed the real case. And the first fardbeyan of the informant. F.I.R. of the present case which was recorded in the morning of 28.2.1983 is the fabricated and concocted story. In the F.I.R. itself the informant has stated that immediately after the occurrence he went to his house and from there he went to Bharwalia police out post. There he informed the police force regarding the occurrence and from there and along with Chaukidar he went to police station for recording his fard beyan. P.W.1 has stated that he along with P.W.4 came at Bharwalia out post and after giving them information they again came back at the place of occurrence along with constable, dafadar and Chaukidar. P.W.4 has also admitted that he along with P.W.1 came to police out post at Bharwalia where his thumb impression was taken. He again came along with constable at the place of occurrence and from there went to the police station along with Chaukidar. This statement has also been corroborated by P.W.9. P.W.9 has also admitted that he

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came to know about the incident when P.W.4 along with P.W.1 came at police out post where he was doing his duty and narrated the incident before Jamadar. Jamadar thereafter had written something and Meghu Sahni P.W.4 put his thumb impression thereafter they came at place of occurrence and P.W.4 in the company of Chaukidar went to the police station. Counsel for the appellant has submitted that all these evidence only indicate that fard beyan on the basis of which the prosecution of the appellants have been launched is not the first fard beyan of the informant. First fard beyan of the informant was instituted at the police out post but that has been concealed by the prosecution. P.W.10 the Investigating Officer has also stated that he never received any document or written report from Bharwalia police out post though admittedly it was recorded as per the evidence of P.W.1, P.W.2 and P.W.9. The present F.I.R. was instituted after 6-7 hours delay in the morning of 28.2.1983. The prosecution case should have been disbelieved for this very reason as real case of prosecution has not been brought before the court and on the basis of concocted and fabricated story the appellants have been convicted.

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10. Mr. Lala Kailash Bihari counsel for the State has submitted that defence version regarding delay concoction and fabrication has no substance as the Investigating Officer has admitted that there was no such document received by him. This is only a presumption of the defence and that cannot be a groaund for discrediting the prosecution case. I find from the evidence of P.W.9 that he came to know about the entire incident on the basis of the statement made by P.W.4 at Bharwalia out post. P.W.1 and P.W.4 have admitted that some statement was recorded at out post on which P.W.4 has put his thumb impression. This was a very important document for judging the correctness of the prosecution case, which has deliberately been concealed. This act on the part of the prosecution

creates doubt regarding the correctness of the prosecution case. The first statement of P.W.4 was a very important piece of evidence for believing the case of prosecution. In absence of that presumption goes against the prosecution.

11. Second limb of argument on behalf of the counsel for the appellant is that very genesis of occurrence is doubtful. The prosecution case is that P.W.4, P.W.6 and the deceased Dahari Sahni all three brothers had gone to Ekdarwa centre for collecting Chalan of sugar cane. It has come in the evidence of P.W.4 and other witnesses that the distance of Ekdarwa centre is about four miles from the Village Dudhwalia. P.W.4, P.W.6 and the deceased proceeded from their village for Ekdarwa at 5 P.M. in the evening in the month of February i.e a winter time. In February at 5 P.M. there is almost darkness. They came Ekdarwa and remained there till 8 P.M. Thereafter they proceeded in the night itself for their village through a route which is not straight and easier. They took a circuitous route through village Khairwa where the place of occurrence is situated. The witnesses were cross examined on this point that why in the late night they took a circuitous route for going to village Dudhwalia from Ekdarwa but none of them could answer satisfactorily that why they chose a long circuitous route. P.W.4 and P.W.6 have also admitted in their evidence that there is centre at their village itself for collecting chalan of sugar cane and one of the brother of Janak Singh P.W.1 is Incharge for distributing Chalan among the villagers. When Chalan was available in the village itself then there was no reason for P.W.4 P.W.6 and the deceased to travel in the night for collecting chalan. The story set up by the prosecution for bringing the chalan is falsified by the evidence of the prosecution witnesses themselves as they have admitted that the chalan is very much available in the village itself. Considering such evidence the court below should have considered that the very genesis of the prosecution case i.e. traveling to Ekdarwa

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for chalan and while coming back through village Khairwa while reached in front of the house of Rajdeo Chaubey the occurrence took place, is unbelievable and the case of the prosecution should have been disbelieved.

12. I find that P.W.4 and P.W.6 both have admitted in their evidence that the sugar chalan could have been available to them in the village itself and for that one of the brother of P.W.1 is made Incharge. If this is so there was no reason for all three brothers i.e. P.W.4, P.W.6 and the deceased to travel in odd hour to a distant place for chalan. This raises some doubt so far the genesis is concerned.

13. Further it has been submitted by the appellants' counsel that the prosecution witnesses have not stated that plan of P.W.4 P.W.6 and deceased regarding traveling to Ekdarwa and coming back to their village in odd hour of night through village Khairwa was known to the appellants. The prosecution witness have admitted that normal route for traveling from village Dudhwalia to Ekdarwa is a pitch road which does not pass through village Khairwa. In the given circumstances prosecution has not been able to prove that how the appellants could have watched for them at villagage Kharwa for their coming and to commit the murder of Dahari Sahni. Neither the time nor their plan to travel was known to the accused persons. This is also not the normal route for traveling. It only indicates that occurrence took place in some other manner but on account of admitted enmity the appellants have been implicated in this case.I find substance in this submission.

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14. Counsel for the appellants has also submitted that real occurrence which had taken place at the house of Rajdeo Choubey and in which Dahari Sahni was killed, has come in the evidence of prosecution witnesses, which supports the defence version. P.W.2 in his evidence has stated that he heard rumor that Dahari Sahni had entered into the house of Rajdeo Chaubey for committing rape. P.W.6

admitted that the case for committing rape has been instituted against P.W.1 and Dahari Sahni by the daughters of Rajdeo Chaubey. P.W.8 has also admitted that he came to know that P.W.1 and Dahari Sahni had entered into the house of Rajdeo Chaubey. P.W.9 has stated that two daughters of Rajdeo Chaubey had stated in his presence to the Investigating officer that Dahari Sahni had come to out rage their modesty with Janak Singh. P.W.9 has also admitted that daughters of Rajdeo Chaubey have instituted case against P.W.1 and Dahari Sahni for committing rape. P.W.10 who is Investigating Officer has stated that female accused persons have confessed before him that they have killed and assaulted Dahari Sahni but on their statement he did not institute a case for committing rape as they admitted their guilt. Investigating Officer has also admitted that female accused persons were not sent for recording their statement under Section 164 Cr.P.C. and they were also not sent for their medical examination. Investigating Officer has also admitted that dead body of Dahari Sahni was found inside the room of Rajdeo Chaubey and blood stains were also found inside the room.

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15. Counsel for the appellants submits that all these evidence collectively indicate that the defence version of the occurrence that Dahari Sahni with P.W.1 Janak Singh entered into the house of Rajdeo Chaubey where only female members of the family were present. And they committed rape on which alarm was raised and Dahari Sahni was caught assaulted and died but Janak Singh managed to flee away is the real story of occurrence. The prosecution version of case was hatched up in conspiracy with P.W.4, P.W.6 and P.W.9 and a story was concocted in which the appellants who are father and sons were named as accused.

16. Mr. Lala Kailash Bihari counsel for the State has submitted that so far the concoction and fabrication is concerned for that there was no time as within few

hours of the occurrence the prosecution case was unfoled by P.W.4 and P.W.6. It has come in the evidence of witnesses that Dahari Sahni had been instrumental in getting Vikrama Tiwary arrested in connection with some criminal case. There was strong motive for taking revenge from Dahari Sahani. There is no reason to disbelieve the prosecution case and the prosecution evidence.

17. What I find that P.W.2, P.W.6, P.W.8, P.W.9 and P.W.10 all have admitted in their evidence that daughters of Rajdeo Chaubey had instituted a case against P.W.1 and Dahari Sahni for committing rape in the same night. They also confessed that Dahari Sahni was killed because of the assault. The evidence of I.O. shows that deliberately he did not investigate the case on the basis of the statement of daughters of Rajdeo Chaubey. If there are two story of one incident and one story has completely been concealed from scrutiny of the court in such case conviction is not safe. This aspect has totally been over looked by the trial court. I find that the prosecution has not been able to prove its case beyond reasonable doubt. The judgment and order of conviction of the trial court is set aside. All appellants are acquitted of the charge. All four appellants are on bail, they are discharged from the liability of their bail bonds.

**(Mridula Mishra, J)**

**I agree**

**(Shailesh Kumar Sinha, J)**

**Patna High Court**
**The 12th day of May l,2008**
**N.A.F.R./sss.**

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